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Congress of the United States
House of Representatives
Washington, D.C. 20515

July 28, 1978

Dear Colleague:

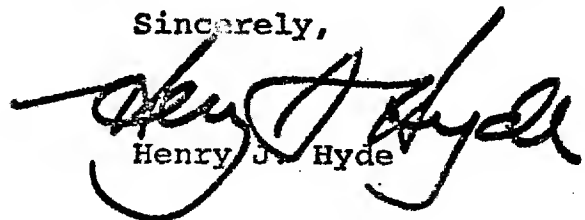
Very shortly the House will be considering H. R. 7308, the Foreign Intelligence Surveillance Act of 1978. This will be one of the most important issues before us this entire session.

I urge you to read the enclosed letter expressing a point of view that should assist you in evaluating amendments that will be offered in an effort to make what is now a thoroughly unacceptable bill somewhat more acceptable.

In a time when terrorism has surfaced as a political weapon elsewhere in the world, it is vital that we not deliberately hobble our foreign intelligence capability as, in my opinion, H. R. 7308 most certainly does.

Please take the time to read the enclosed letter. Thanks.

Sincerely,



Henry J. Hyde

HJH:hjk



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July 28, 1978

The Honorable Robert McClory
The Committee on the Judiciary
House of Representatives
Washington, D. C. 20515

Dear Congressman McClory:

We wish to alert you to an emergency situation affecting the future of the U.S. intelligence capability.

The House of Representatives next week will take up a bill (HR 7308) which proposes to regulate electronic surveillance for foreign-intelligence gathering by U.S. agencies. This bill, if passed, will have a seriously destructive impact on the gathering of intelligence vital to the internal security of the United States.

As written, this bill gives complete protection to aliens and foreign intelligence agents by making it next to impossible for the FBI or CIA to monitor and frustrate their activities.

Under this proposed legislation, in order to keep track of the activities of foreign espionage organizations and their agents, a special judicial court would be set up with authority to oversee and second-guess our counterintelligence experts.

Among the hundreds of examples that arise in the conduct of sensitive counterintelligence cases, the FBI would be obliged under this bill to go through a lengthy court procedure. This procedure could involve the disclosure of sensitive sources and methods and other factors necessary to persuade a judge to issue a warrant.

For example, this procedure could lead to a repeat of the outrageous situation which recently arose when the Attorney General himself was held in contempt of Court for not publicly disclosing the identities of FBI informants.

This cumbersome procedure is not only subject to leakage but to delay which could destroy the effectiveness of prompt counter-intelligence surveillance necessary for identifying "unknowns," "dead drops," and other support mechanisms employed in espionage operations.

Furthermore, our agents could be put in great jeopardy by the disclosure of sensitive information, and the Courts have a poor record of keeping such matters secret. We have in the past

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Capitol Hill and have been astonished to discover that adroit parliamentary maneuvering has taken place which has denied a full airing by professionals of all the facts regarding the potential damage to our national counterintelligence establishments.

Congressmen who oppose this bill are going to have a tough time of it. For one thing, the new heads of the FBI and CIA have testified that they can "live with" the proposed bill. This endorsement was part of the charade mounted by the parliamentary tricksters.

However, several responsible Congressmen from both parties will be offering amendments to this bill aimed at preventing destruction of our vital intelligence and security needs. These amendments will ensure that electronic surveillance of foreigners does not require court action; that no U.S. citizen can be placed under surveillance without approval of the Attorney General and knowledge of Congress; and that the President may authorize electronic surveillance in cases of dire threat to national security.

In addition to the obvious drawbacks which are inherent in the original legislation, there also is a serious Constitutional issue which has been overlooked.

Under a recognized sanction, every President since Franklin Roosevelt has exercised the right to order the surveillance of American citizens under suspicion, as well as foreign nationals, without a court order in national security cases. Critics of the proposed bill contend, with justification, that it is grossly contrary to the principle of the separation of powers to attempt to inject the judiciary into the realm of foreign affairs and intelligence and security activities.

This position finds strong support among Constitutional experts. Robert H. Bork, a Yale professor of law and a former Solicitor General, derides the claim that providing a judicial warrant for electronic surveillance would guarantee that U.S. intelligence will hereafter be brought under "the rule of the law." In a powerful critique published in The Wall Street Journal on March 9, he wrote:

"...The bill pretends to create a real set of courts that will bring 'law' to an area of discretion. In reality, it would set apart a group of judges who must operate largely in the dark and create rules known only to themselves. Whatever that may be called, it debases an important idea to term it the rule of law; it is more like the uninformed, unknown and uncontrolled exercise of discretion."

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We believe these arguments to be unassailable. We urge you to oppose HR 7308 (called the "Kennedy bill" by some) unless it is amended to better protect legitimate U.S. intelligence activities.

Faithfully yours,

Elbridge Durbrow

Elbridge Durbrow
President
U.S. Ambassador (Ret.)

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